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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

BRADLEY J. MAMER, and DOES I-X
inclusive,

Case No.: 3:12-cv-00381-LRH-VPC

Plaintiff,

vs.

**MOTION TO DISMISS SECOND
AMENDED COMPLAINT (DOC. # 5)
OR, IN THE ALTERNATIVE, STAY
PROCEEDINGS**

ALBERT D. SEENO, JR., an individual;
THOMAS A. SEENO, an individual; ALBERT
D. SEENO, III, and individual; MICHAEL P.
GHIORSO, an individual; KEVIN P.
MCCAULEY, an individual; EMILIA K.
CARGILL, an individual; DOES I-X,
inclusive; and WINGFIELD NEVADA
GROUP HOLDING COMPANY, LLC, a
Nevada company; WINGFIELD NEVADA
GROUP MANAGEMENT COMPANY, LLC,
a Nevada company; and ROE
CORPORATIONS XI through XX,

Defendants.

**MOTION TO DISMISS SECOND AMENDED COMPLAINT (DOC. # 5) OR, IN THE
ALTERNATIVE, STAY PROCEEDINGS**

Defendants Albert D. Seen0, Jr., Thomas A. Seen0, Albert D. Seen0, III, Michael P. Ghiorso, Kevin P. McCauley, Emilia K. Cargill, and Wingfield Nevada Group Management Company, LLC ("WNG Management Company"), move this Honorable Court for an order dismissing Plaintiff Bradley J. Mamer's ("Mamer") Second Amended Complaint (Doc. # 5) or, in the alternative, staying this action while the companion and related state court action is adjudicated, pursuant to the federal abstention doctrine set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). This motion is based on the following Memorandum of Points and Authorities, the attached exhibits properly subject to judicial notice, and the pleadings and papers on file herein.

DATED this 29th day of October, 2012.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
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By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

To assist this Court with its understanding of the sequence, nature, and scope of the various, interrelated lawsuits that have been filed that concern this action, the following list describes the filing events that have occurred in this and the two related lawsuits, in

1 chronological order:

2 1. On January 27, 2012, Wingfield Nevada Group Holding Company (“WNG”) filed
3 a lawsuit against Harvey Whittemore (“Whittemore”) Annette Whittemore, and The Lakeshore
4 House Limited Partnership (collectively the “Whittemore Defendants”) in the state court located
5 in Clark County, Nevada, *Wingfield Nevada Group Holding Co., et al. v. Whittemore, et al.*, Case
6 No. A-12-655426-B, alleging that the Whittemore Defendants embezzled and misappropriated
7 assets and money from WNG. *See Exhibit 1.*¹ This Clark County lawsuit is referred to herein
8 as the “state court action.”

9 2. On February 1, 2012, in retaliation to WNG’s state court action, the Whittemores
10 filed a lawsuit in this federal Court against WNG managers Thomas Seenos and Albert Seenos, Jr.,
11 and Albert Seenos, Jr.’s son, Albert Seenos, III (collectively, the “Seenos”), *Whittemore, et al. v.*
12 *Seenos, et al.*, Case No. 3:12-cv-00063-LRH-WGC. *See Exhibit 2.* The Whittemores
13 strategically failed to name WNG in their federal court action and accused the Seenos of having
14 made purported threats of violence related to Whittemore’s involvement with WNG. This
15 lawsuit is referred to herein as the “Whittemores’ federal court action.”

16 3. On February 9, 2012, in the state court action, WNG filed an amended complaint
17 naming Bradley J. Mamer (Plaintiff in the instant federal court action) as a defendant in light of
18 newly discovered evidence. WNG alleged that Mamer conspired with the Whittemores to harm
19 WNG misappropriated trade secrets, and breached contracts and implied duties of good faith
20 arising out of Mamer’s employment with WNG. WNG’s First Amended Complaint filed in the
21 state court action is attached hereto as **Exhibit 3**.

22 4. On February 10, 2012, in the Whittemores’ federal court action, the Seenos filed a
23 Motion to Dismiss or, in the Alternative, Stay Proceedings, in which the Seenos argued that the
24 Whittemores’ claims should have been asserted in the state court action. The Seenos alleged that
25 the Whittemores’ federal court action was duplicative and fell within the scope of the state court
26

27 ¹ This Exhibit and the remaining attached Exhibits are properly subject to judicial notice.
28 *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (holding
that judicial notice of court filings and other matters of public record is proper).

1 action despite the Whittemores' deliberate failure to name WNG as a defendant, and that a
2 dismissal or stay was warranted in accordance with federal abstention doctrines, including the
3 *Colorado River* doctrine.

4 5. On April 27, 2012, in the state court action, the Whittemores filed their Answer
5 and Counterclaim wherein the Whittemores made allegations and claims against WNG that were
6 identical to those alleged in their federal court action against the Seenos, which further confirmed
7 the arguments made in the Seenos' Motion to Dismiss or, In the Alternative, Stay Proceedings.

8 6. On May 11, 2012, in the state court action, Mamer followed the Whittemores'
9 lead and he too filed counterclaims against WNG with his Answer. *See Exhibit 4*. Nowhere in
10 Mamer's Affirmative Defenses did Mamer challenge WNG's standing to sue Mamer based upon
11 his employment relationship (or lack thereof) with Mamer. *See id.* at 12-13. Rather, in his
12 counterclaims, Mamer conceded this point and alleged claims for constructive discharge and
13 intentional infliction of emotional distress—all based upon allegations of hostile working
14 conditions, including threats of violence, during his employ with WNG. *See id.* at 13-15.

15 7. Shortly thereafter, in the state court action, Mamer moved to compel arbitration of
16 WNG's claims against him (*see Exhibit 5*) and his counterclaims (*see Exhibit 6*) pursuant to the
17 arbitration provision in Mamer's contract with WNG, referred to by Mamer and entitled,
18 "Wingfield Nevada Group Employee Handbook (Updated February 1, 2011)." Mamer argued
19 that the WNG Employee Handbook "effective February 1, 2011 . . . binds both WNG and
20 Defendant Mamer" and that the Handbook's arbitration provision governed these claims, thus
21 mandating arbitration. *See Exhibits 5, 6, 7*. The state court agreed in part and ordered three of
22 WNG's four claims to arbitration and one of Mamer's two counterclaims to arbitration. *See*
23 **Exhibits 8, 9**.

24 8 On July 11, 2012, this time following the Whittemores' retaliatory federal court
25 filing, Mamer filed the instant action pending before this Court, and on August 11, 2012, filed his
26 First Amended Complaint. *See Doc. ## 1, 2*. In his First Amended Complaint, Mamer made
27 allegations against WNG and WNG employees and an affiliate entity that are duplicative of those
28 made in his state court counterclaim against WNG. All of Mamer's allegations were based upon

1 and stem from his employ with WNG and the purported hostile working conditions that included
2 alleged threats of violence. *See generally* Doc. # 2.

3 9. On August 15, 2012, in the Whittemores' federal court action, this Court heard
4 arguments on the Seenos' Motion to Dismiss or, in the Alternative, Stay Proceedings. This Court
5 granted the Seenos' motion and stayed the Whittemores' federal court action pending resolution
6 of the state court action pursuant to the *Colorado River* doctrine and based upon the duplicative
7 nature of the Whittemores' federal court action. *See Exhibit 10*.

8 10. A mere four days after this Court's ruling in the Whittemores' federal court
9 action, on August 19, 2012, in the state court action, Mamer voluntarily dismissed his identical
10 state court counterclaims. *See Exhibit 11*. His withdrawal was a clear effort to avoid a ruling in
11 this federal Court action identical to the ruling in the Whittemores' federal court action.

12 11. Nonetheless, on September 6, 2012, in the instant action, Defendants filed their
13 Motion to Dismiss or, In the Alternative, Stay Proceedings (Doc. # 4), wherein Defendants
14 argued that due to the duplicative nature of the instant action and the state court action, and
15 Mamer's forum shopping, dismissal or a stay of the instant federal proceedings was warranted
16 pursuant to the *Colorado River* doctrine.

17 12. On September 9, 2012, in this federal court action, three days after Mamer was
18 served with Defendants' Motion to Dismiss or, In the Alternative Stay Proceedings (Doc. # 4),
19 Mamer filed his Second Amended Complaint (Doc. # 5), wherein Mamer removed WNG as a
20 named defendant and limited all references to his employer to WNG Management Company
21 instead of WNG. *See generally id.*

22 13. On September 11, 2012, in the Whittemores' federal court action, this Court
23 issued its written decision memorializing its granting of the Seenos' motion to stay the
24 Whittemores' federal proceeding pending resolution of the state court action. *See Exhibit 12*.

25 **II. OVERVIEW**

26 The sequence of events that have occurred in this action, the Whittemores' federal court
27 action, and the state court action reveal that a clearer case of forum shopping cannot be found.

28 Mamer filed this action in a desperate attempt to retaliate against Defendants because WNG and

1 other stated-court plaintiff entities first filed a complaint against Mamer in the state court action.

2 In an attempt to forum shop and sensationalize, Mamer filed this inflammatory and
3 salacious lawsuit. Importantly, however, Mamer had already made duplicative claims in his state
4 court Counterclaim. *See Exhibit 4*. Mamer's state court counterclaims were based upon the
5 very same facts and circumstances alleged in this action. *See id.* Mamer voluntarily withdrew
6 his counterclaims in the state court action only four days after this federal Court stayed the
7 Whittemores' federal court action pending resolution of the state court action. *See Exhibit 11*.
8 Mamer's voluntary dismissal of his identical state court counterclaims against WNG was without
9 question an attempt to avoid a similar motion by Defendants and an identical ruling by this Court
10 in this action.

11 However, this lawsuit comes well after—yet clearly in support of—the Whittemores' filing
12 of their equally sensationalized federal court complaint. *See Exhibit 2*. The Whittemores, too,
13 filed their federal court action in a desperate attempt to forum shop and avoid litigating their
14 duplicative claims in the same state court action. Unsurprisingly, however, this Court rejected
15 the Whittemores' efforts. *See Exhibits 10, 12*. On August 15, 2012, this Court stayed the
16 Whittemores' federal action pending resolution of the state court action. *See id.* This Court's
17 decision was based upon the abstention doctrine articulated in *Colorado River Water*
18 *Conservation District v. United States*, 424 U.S. 800 (1976). *See generally Exhibits 11, 13*.
19 This Court found that the state court action was identical to the Whittemores' federal action and
20 that exceptional circumstances existed for abstention. *Id.*

21 As stated above, only four days after this Court granted the Seenos' Motion to Dismiss or,
22 In the Alternative, Stay Proceedings in the Whittemores' federal court action and in anticipation
23 of the instant motion made by Defendants, Mamer voluntarily dismissed his pending state court
24 counterclaims. *See Exhibit 11*. In fact, Mamer has duplicated nearly every action taken by the
25 Whittemores in the state court action. But, now Mamer attempts to avoid the Whittemores'
26 strategic failures. Mamer's efforts to forum shop and sensationalize are obvious.

27 After this Court's ruling in the Whittemores' federal court action, Mamer recognized the
28 unequivocal fact that all of his allegations have already been alleged in the state court action and

1 that this Court's ruling in the Whittemores' federal court action was indicative of the future of his
 2 duplicative federal action. Realizing that his initial superficial attempt to distinguish the two
 3 actions by merely naming the Seenos' affiliated entity and employees in this action was
 4 insufficient, Mamer—in a last-ditch effort to avoid litigating these claims in the state court action—
 5 voluntarily withdrew his state court counterclaims. *See id.* Still yet, however, Mamer again
 6 realized that his state court dismissal was not enough.

7 Only after reviewing Defendants' Motion to Dismiss or, In the Alternative, Stay
 8 Proceedings (Doc. # 4) did Mamer realize that the state court action and the instant action were
 9 still identical. All of the allegations and claims alleged in his First Amended Complaint stem
 10 from, concern, arise out of, and involve his employment with WNG and purported hostile
 11 working conditions. Consequently, Mamer again took to additional procedural tactics in an
 12 attempt to misalign the parties in the two lawsuits. Accordingly, on September 9, 2012, Mamer
 13 filed his Second Amended Complaint wherein he removed WNG as a named defendant and
 14 changed all references to his employment with "WNG" to now only refer to his employment with
 15 WNG Management Company. *See* Doc. # 5.

16 But, Mamer's tardy attempts to distinguish the cases and the over-reaching, inflammatory
 17 hyperbole set forth in his Second Amended Complaint confirm the obvious: this action is nothing
 18 new when compared to the baseless allegations that Mamer already alleged as compulsory
 19 counterclaims against WNG in the state court action. For the reasons further discussed below, a
 20 dismissal or a stay of this action is warranted. Mamer should be compelled to litigate these
 21 claims as mandatory counterclaims in the existing state court action filed months before Mamer
 22 filed his spurious, inflammatory complaint in this action.

23 **II. SIMILARITIES OF THE ISSUES RAISED IN THE ACTIONS**

24 At the outset, Mamer's Second Amended Complaint must be stripped of the scandalous,
 25 inflammatory, and otherwise libelous accusations that are entirely unrelated to and have no
 26 bearing on Mamer's claims.² Regardless, even with the redundant, immaterial and scandalous
 27

28
 2 If this matter proceeds, Defendants intend to move to strike from Mamer's pleading all

1 minutia, it is clear that Mamer's complaint solely arises from and concerns his employment with
 2 WNG, despite his attempt to argue that his employment was only with WNG's affiliate, WNG
 3 Management Company. Like the instant action, Mamer's previously alleged counterclaims in the
 4 state court action arose from and concerned his employment with WNG. Despite Mamer's
 5 attempted manipulations, the facts, circumstances, and legal issues in the two actions are the
 6 same—if not identical.

7 **A. MAMER'S CLAIMS AND ALLEGATIONS CONCERN WNG.**

8 Although Mamer's Second Amended Complaint now only alleges claims against WNG
 9 Management Company and not WNG, and Mamer has edited his previous complaint to limit his
 10 allegations to his employment only with WNG Management Company, Mamer's changes are
 11 inconsequential and insufficient to misalign the parties. As an initial matter, the section of the
 12 Employment Handbook upon which Mamer's claims are based defines "the Company" as
 13 "Wingfield Nevada Group and its affiliated companies." See **Exhibit 13**; Doc. # 5 ¶¶ 59, 152,
 14 156, 184-86. Aside from the plain language of the Handbook, Mamer is judicially estopped from
 15 arguing that he was not employed by WNG. The doctrine of issue preclusion bars such an
 16 argument as well.

17 Judicial estoppel applies to bar a party from taking a position when:

- 18 (1) the same party has taken two positions; (2) the positions
 19 were taken in judicial or quasi-judicial administrative
 20 proceedings; (3) the party was successful in asserting the first
 21 position (*i.e.*, the tribunal adopted the position or accepted it
 22 as true); (4) the two positions are totally inconsistent; and (5)
 the first position was not taken as a result of ignorance, fraud,
 or mistake.

23 *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007) (internal
 24 quotations omitted). Mamer is judicially estopped from disputing his employment with WNG.

25 First, in the state court action, Mamer moved to compel to arbitration WNG's claims
 26 against him and Mamer's counterclaims against WNG based upon the position that he was an
 27 employee of WNG and the arbitration provision in his Employment Handbook governed the
 28

redundant, immaterial, impertinent, and scandalous matters. See Fed. R. Civ. P. 12(f).

1 disputes. See **Exhibits 5-7**. Second, it cannot be disputed that Mamer took this position in a
 2 judicial proceeding. Third, Mamer was successful in asserting his employment relationship with
 3 WNG because the state court ordered three of WNG's four claims to arbitration and one of
 4 Mamer's two claims to arbitration. See **Exhibits 8, 9**. Fourth, the two positions would be totally
 5 inconsistent. And, fifth, Mamer's position was not taken as a result of ignorance, fraud, or
 6 mistake, because it was, in fact, correct. Mamer cannot now dispute his employment relationship
 7 with WNG, and his strategic decision to remove WNG from this case evidences his improper
 8 motives.

9 The doctrine of issue preclusion similarly bars any argument from Mamer that WNG was
 10 not his employer. Issue preclusion applies when: (1) the issue decided in the prior litigation is
 11 identical to the issue presented in the current action, (2) the initial ruling is on the merits and has
 12 become final, (3) the party against whom the judgment is asserted was a party or in privity in the
 13 prior litigation, and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp.*
 14 *v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). The doctrine of issue preclusion bars
 15 Mamer from disputing his employment relationship with WNG.

16 The issue concerning Mamer's employment relationship with WNG was presented in the
 17 state court action when Mamer sought to compel the claims asserted by and against WNG to
 18 arbitration. Additionally, the state court's ruling concerning the arbitrability of those claims has
 19 become final. See *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90 n.5, 127 P.3d 1057, 1063
 20 (2006) ("[T]he order compelling arbitration was a final judgment in the matter . . ."); NRS
 21 38.247(1)(a) ("An appeal may be taken from: . . . [a]n order denying a motion to compel
 22 arbitration."); Nev. R. Civ. P. 54(a) (defining "Judgment" to include "a decree and any order
 23 from which an appeal lies"). Further, Mamer is a party to the state court action. And, finally, the
 24 issue was raised by motion and was actually and necessarily litigated. Mamer cannot deny that
 25 he was employed by WNG.

26 Mamer's attempt to distance himself from WNG in this action in order to misalign the
 27 parties in his Second Amended Complaint is futile. Mamer's Second Amended Complaint does
 28 everything but name WNG. Mamer's Second Amended Complaint still arises out of and

1 concerns his employment relationship with WNG and is duplicative of the all-inclusive state
 2 court action. His claims in this action are mandatory counterclaims in the state court action.

3 **B. THE FACTS AND CIRCUMSTANCES PREVIOUSLY ALLEGED IN THE**
 4 **STATE COURT ACTION.**

5 WNG filed its First Amended Complaint in the state court action on February 9, 2012.
 6 See **Exhibit 3**. In the state court action, WNG named Harvey Whittemore, Annette Whittemore,
 7 The Lakeshore House Limited Partnership (of which the Whittemores are the general partners),
 8 and Mamer as defendants. See *id.* On May 11, 2012, Mamer filed his Answer and Counterclaim
 9 to WNG's First Amended Complaint. See **Exhibit 4**. In the state court action, WNG's
 10 allegations in its First Amended Complaint and Mamer's allegations in his strategically-
 11 dismissed counterclaim concern the following:

12 1. The historical ownership structure of WNG and Whittemore's involvement as the
 13 managing member of WNG. See **Exhibit 3** at 3-5.

14 2. Whittemore's misuse, misappropriation, and embezzlement of corporate assets
 15 and funds. *Id.* at 5-29.

16 3. Whittemore's dealings with and causing a WNG subsidiary, Coyote Springs
 17 Investment, LLC ("CSI"), to contract with Pardee Homes of Nevada ("Pardee"), whereby
 18 Whittemore made inappropriate agreements with these and other third parties to advance his own
 19 personal interests. *Id.* at 10-11.

20 4. The terms governing Mamer's employment with WNG and the promises to which
 21 Mamer contractually bound himself as a result of that employment. *Id.* at 30.

22 5. Mamer's improper contacts with Whittemore and continued communications and
 23 conspiracies with the Whittemores to harm WNG. *Id.*

24 6. Mamer and the Whittemores' conspiracies to misappropriate millions of dollars of
 25 WNG assets and funds, and confidential proprietary information, without WNG's or the Seenos'
 26 authority or knowledge. *Id.* at 34, 43.

27 7. Mamer's breaches of his contractual duties and the implied covenant of good faith
 28 and fair dealing arising out of his employment with WNG, including those contained in his WNG

Employee Handbook and the Confidentiality and Non-Disclosure Policy therein. *Id.* at 41-43.

8. Mamer was a longtime employee of WNG and its predecessor-in-interest.

Exhibit 4 ¶ 4.

9. WNG allegedly created dangerous and harassing working conditions. These purported conditions were in violation of the Employee Handbook and allegedly included threats of violence against Mamer and coercion to relay the threat of violence to Whittemore. *Id.* ¶ 5.

10. Albert Seeno, III, made a purported comment concerning what Mamer refers to as, “the Seeno Way.” *Id.* ¶ 6.

11. Albert Seeno, III, purportedly instructed Mamer to contact Whittemore and relay a threat. *Id.* ¶ 7.

12. Mamer informed WNG’s general counsel of the purported threats. *Id.* ¶ 8.

13. WNG’s Employee Handbook prohibited threats in the workplace or against any employee. *Id.* ¶ 9.

14. WNG allegedly did not remedy the purported threatening working conditions. *Id.* ¶ 10.

15. Mamer allegedly felt compelled to resign. *Id.*

16. The purported threats of violence allegedly caused Mamer physical and emotional distress. *Id.* ¶ 14.

As discussed below, Mamer repeats in this action (often times nearly verbatim) the factual circumstances surrounding WNG’s general allegations and Mamer’s very own allegations previously alleged in his mandatory state court counterclaims.

C. THE FACTS AND CIRCUMSTANCES ALLEGED IN THE INSTANT ACTION.

Mamer filed his First Amended Complaint in this action on August 11, 2012. *See* Doc. # 2. In that complaint, Mamer named as Defendants the following persons and entities: Thomas Seeno, Albert Seeno, Jr., Albert Seeno, III (previously referred to as, the “Seenos”); Michael Ghiorso, Kevin McCauley, and Emilia Cargill (collectively, “WNG employees”); WNG; and WNG Management Company. *See id.* at 1. Now, however, as discussed above, Mamer has strategically excluded WNG as a defendant from his Second Amended Complaint. *See* Doc. # 5.

1 Yet, for the reasons discussed above, *see supra* § II.A., this fact is inconsequential and does not
 2 change the fact that Mamer raises factual allegations, circumstances, and legal issues in this
 3 action that are identical to those that he already alleged in the state court action. *See generally*
 4 Doc. # 5.

5 The facts and circumstances alleged in this federal court action specifically include the
 6 following:

7 1. The historical ownership structure of WNG and Whittemore's involvement as the
 8 managing member of WNG. *Id.* ¶¶ 13-19, 31, 33.

9 2. Whittemore's misuse, misappropriation and embezzlement of corporate assets and
 10 funds. *Id.* ¶¶ 89, 90, 190-91, 46.

11 3. Whittemore's dealings with and causing a WNG subsidiary, CSI, to contract with
 12 Pardee, whereby Whittemore made inappropriate agreements with these and other third parties to
 13 advance his own personal interests. *Id.* ¶¶ 20, 52, 69, 125, 202-05.

14 4. Mamer's longtime status as an employee of WNG and its predecessor-in-interest.
 15 *Id.* ¶ 4.

16 5. The Seenos, WNG, and WNG employees allegedly created dangerous and
 17 harassing working conditions. These conditions were in violation of the Employee Handbook
 18 and purportedly included threats of violence against Mamer and coercion to relay the threat of
 19 violence to Harvey Whittemore. *See* ¶¶ 63, 125, 132, 164-68, 74-79, 88, 117, 152-54, 173-74.

20 6. Albert Seeno, III, made a purported comment concerning what Mamer refers to as,
 21 "the Seeno Way." *Id.* ¶¶ 53, 54, 94, 132, 141, 153.

22 7. Albert Seeno, III, purportedly instructed Mamer to contact Harvey Whittemore
 23 and relay a threat. *Id.* ¶¶ 63, 125, 132, 133, 153, 154.

24 8. Mamer informed WNG's general counsel of the purported threats. *Id.* ¶¶ 65, 94,
 25 97, 119-20, 155, 183-86.

26 9. WNG's Employee Handbook prohibited threats in the workplace or against any
 27 employee. *Id.* ¶¶ 59, 152, 156, 180-82.

28 10. Defendants supposedly did not remedy the working conditions that Mamer alleges

1 were threatening. *Id.* ¶¶ 120, 155-57, 184-86.

2 11. WNG, the Seenos, and WNG employees allegedly denied Mamer rights under his
3 employment with WNG through threats and other purported illegal conduct. *See id.* ¶¶ 65, 73,
4 89-90, 94, 97, 118, 120, 164-68, 72, 74-79, 88, 117, 152-57, 173-74, 183-86, 196.

5 12. Mamer allegedly felt compelled to resign. *Id.* ¶¶ 68, 99, 100, 104.

6 13. The purported threats of violence allegedly caused Mamer physical and emotional
7 distress. *Id.* ¶¶ 100, 122-24, 127, 155, 211-14.

8 14. Mamer was forced to take a payroll deduction for amounts due to WNG for the
9 repairs and remodeling of Mamer's personal residence purportedly agreed to between
10 Whittemore and Mamer as part of his employee compensation, but not authorized or known by
11 WNG or the Seenos. *Id.* ¶¶ 27, 48-51, 57-58.

12 15. Mamer's Relocation Agreement purportedly agreed to between Whittemore and
13 Mamer as part of his employment with WNG, but not authorized or known by WNG or the
14 Seenos was not honored. *Id.* ¶¶ 26, 39, 61, 62, 70, 71, 147-52.

15 16. "The Seeno Defendants sued Mamer in Nevada District Court alleging among
16 other things civil conspiracy, breach of contract, breach of the implied covenant of good faith and
17 fair dealing, and misappropriation of trade secrets." *Id.* ¶ 105.

18 **D. THE LEGAL ISSUES RAISED IN THE STATE COURT ACTION.**

19 The legal issues raised by WNG and Mamer in the state court action can be fairly
20 summarized as follows:

21 1. Concerning the ownership and operation of WNG, the Whittemores engaged in
22 misappropriation, fraud, and conversion. *See Exhibit 3* at 3-37.

23 2. Concerning the ownership and operation of WNG, Mamer and the Whittemores
24 engaged in civil conspiracies to damage WNG and the Seenos' financial interests. *Id.* at 30, 34,
25 43.

26 3. Concerning Mamer's employment contract with WNG, as set forth in the WNG
27 Employee Handbook, Mamer breached the contract. *Id.* at 41-42.

28 4. Concerning his contracts with WNG, Mamer breached his implied covenants of

1 good faith and fair dealings. *Id.* at 30, 41-43.

2 5. Concerning Mamer's employment with WNG, Mamer allegedly felt compelled to
3 resign because of the purported hostile and harassing work environment and conditions. *See*
4 **Exhibit 4** at 13-14.

5 6. Concerning Mamer's employment with WNG, the alleged hostile and harassing
6 work environment caused him physical and emotional distress. *Id.* at 14-15.

7 **E. THE LEGAL ISSUES RAISED IN THE INSTANT ACTION.**

8 The legal issues raised by Mamer in this action consist of the following:

9 1. Concerning Mamer's contract arising out of his employment with and his status as
10 employee of WNG, and the Seenos' alleged threats to have Whittemore make restitution to
11 reimburse WNG for the assets and money that the Whittemores embezzled, misappropriated, and
12 diverted, Mamer has alleged RICO violations. Doc. # 5 at 41-45, 51-52.

13 2. Concerning Mamer's purported Relocation Agreement that he entered into with
14 Whittemore as part of Mamer's employment with WNG and the purported hostile and harassing
15 work environment, Mamer seeks declaratory relief. *Id.* at 45-46.

16 3. Concerning Mamer's employment with WNG, Defendants purportedly violated
17 his employee rights under the FMLA. *Id.* at 47-48.

18 4. Concerning Mamer's employment with WNG, Defendants allegedly violated his
19 employee rights under the FLSA. *Id.* at 48-49.

20 5. Concerning Mamer's employment contract with WNG, as set forth in the WNG
21 Employee Handbook, Defendants allegedly breached the contract. *Id.* at 49-51.

22 6. Concerning Mamer's employment with WNG, the purported hostile and harassing
23 work environment caused him physical emotional distress. *Id.* at 54.

24 7. Concerning Mamer's shareholder interest in CSI that he received from
25 Whittemore as part of his employee compensation with WNG, Defendants allegedly breached
26 their fiduciary duties to Mamer as a result of the contracts entered into between Whittemore and
27 Pardee, causing RICO violations. *Id.* at 53-54.

28 ///

**F. SIMILARITIES BETWEEN THE FACTS, CIRCUMSTANCES, AND
LEGAL ALLEGATIONS AT ISSUE IN THE STATE COURT ACTION
AND THIS ACTION.**

A simple comparison of the facts, circumstances, and legal allegations that Mamer raised in the state court action and the instant action are telling: Mamer's complaints herein are duplicative of those that he alleged in the state court action. Both actions concern alleged wrongs that are all derivative of his employment with WNG.

In the state court action filed by WNG and two of its subsidiaries, those plaintiffs are seeking damages against the Whittemore Defendants arising from Whittemore's control, operation, previous ownership, and abuse of WNG, and the Whittemores misappropriation of funds and assets of WNG. Those plaintiffs are also seeking damages against Mamer for his conspiracies with the Whittemores and his violation of his contractual duties to WNG arising out of his employment with WNG. Mamer asserted counterclaims against WNG, alleging various unlawful and hostile working conditions that caused him to resign and caused him physical and emotional harm.

In this action, Mamer has asserted claims against the Seenos, WNG's affiliate WNG Management Company, and WNG employees arising out of his employment with WNG. These allegations include various unlawful and hostile working conditions that caused him to resign and caused him physical emotional harm. While Mamer has since removed WNG as a named defendant herein in an attempt to misalign the parties, his attempts are disingenuous and futile. *See discussion supra* § II.A. Mamer has done everything but name WNG in his Second Amended Complaint.

In this action, Mamer also seeks recourse under various contracts that he allegedly negotiated with Whittemore. These contracts included those negotiated with Whittemore without the consent or knowledge of the Seenos or WNG. These claims directly relate to WNG's claims in the state court action that Whittemore engaged in fraud, misrepresentation, and conversion and that Mamer conspired with the Whittemores to deprive WNG of assets and funds.

Both lawsuits have common facts and legal claims. Mamer's improper efforts to forum shop only after an unfavorable ruling in the Whittemores' comparable federal court action does

1 not change the fact that all of the allegations and claims stem from and concern Whittemore's
 2 and Mamer's conspiratorial and inappropriate use and abuse of WNG assets and funds, and
 3 Mamer's employment with WNG. And even Mamer's accusations that the Seenos and WNG
 4 employees were allegedly involved in RICO, FMLA, and FLSA violations concern and pertain to
 5 the same facts and circumstances that he had previously alleged as mandatory counterclaims in
 6 the state court action, *i.e.*, Mamer's complaints of various threats and unlawful activity arising
 7 out of his employment with WNG. All of the issues involve the same common nucleus of
 8 operative facts: Mamer's employment with WNG and Defendants' alleged actions to deprive
 9 him of various rights, while causing him harm. Alleging minutia that amounts to nothing more
 10 than sensationalized hyperbole, and which is entirely unrelated and irrelevant, does nothing to
 11 distinguish the parallel alignment of the two lawsuits.

12 These two actions were identical before Mamer's strategic dismissal of his state court
 13 counterclaims and removal of WNG as a named defendant in this case and, despite Mamer's
 14 attempted manipulations, remain substantially similar. Yet, Mamer stubbornly ignores the fact
 15 that WNG's claims against him concern his employment with WNG and his conspiratorial
 16 activities with the Whittemores to harm WNG. Regardless of Mamer's manipulations under the
 17 rules of procedure, Mamer's claims are still mandatory counterclaims to the state court action.

18 **G. THIS COURT'S RULING IN THE *WHITTEMORE V. SEENO* FEDERAL**
 19 **COURT ACTION IS SIGNIFICANT HERE.**

20 The Whittemores preceded Mamer in the filing of their duplicative and scandalous
 21 federal action. *See Exhibit 2.* And, the Whittemores were precluded from proceeding with their
 22 attempt to create vexatious and uneconomical litigation. On August 15, 2012, this Court stayed
 23 the Whittemores' federal action pending resolution of the state court action. This Court
 24 concluded that comprehensive disposition of litigation and conservation of judicial resources
 25 dictated a stay of the Whittemores' federal court action under the *Colorado River* abstention
 26 doctrine. *See Exhibits 10, 12.*

27 In making this determination, this Court gave careful consideration to its recent decision
 28 in *In re Ormat Technologies, Inc.*, 2011 WL 3841089 (D. Nev., Aug. 29, 2011), and based its

1 decision primarily upon the recent Ninth Circuit case, *R.R. Street & Co. Inc. v. Transport Ins.*
 2 *Co.*, 656 F.3d 966 (9th Cir. 2011). This Court found that the state court action and the
 3 Whittemores' federal court action presented the rare circumstance that warranted abstention
 4 under the *Colorado River* doctrine. The Court found that the state court action involved the very
 5 same matters as those at issue in the Whittemores' federal court action.

6 Noting that exact parallelism of the two actions is not required, this Court found that the
 7 matters involved substantially the same parties—despite the Whittemores' failure to name WNG
 8 as a defendant—and substantially the same issues. The state court action amounted to “massive
 9 litigation” concerning partnership disputes between the Seenos and the Whittemores in WNG.
 10 The state court action included within it the same common issues necessary for this Court to
 11 make its determination in the federal court case. The factors for consideration under the
 12 *Colorado River* doctrine were therefore satisfied.

13 Specifically, this Court found that:

- 14 (1) the state court action in Clark County was the more convenient forum;
- 15 (2) piecemeal litigation would certainly result without abstention because both courts
 16 would be required to consider the same issues—most significant, the same damage claims upon
 17 which the Whittemores' RICO claims were based—thus increasing the danger of inconsistent
 18 rulings and the expenditure of the federal court's already strained judicial resources;
- 19 (3) the state court action was filed first and has made significant progress, including
 20 the state court's order compelling various claims and counterclaims to arbitration;
- 21 (4) all of the federal court claims alleged were allowable in the state court action and
 22 the Whittemores could file their federal court claims as counterclaims in the state court action
 23 under NRCP 13(h), which is the best mechanism for dispute resolution under the rules of civil
 24 procedure; and
- 25 (5) the state court has concurrent jurisdiction over the federal law claims and,
 26 therefore, the state court action provided complete and adequate protection of the Whittemores'
 27 rights.³

28 ³ Because the six factors were satisfied, this Court found it unnecessary to make a

As a result of these findings, this Court concluded that a stay of the Whittemores' federal court action pending resolution of the state court action was warranted. This Court summarized that the facts, circumstances, and legal claims at issue in the two actions are the same or overlap to such an extent that the piecemeal litigation factor is entirely overwhelming. Due to the size of the state court action, the state court will be required to monitor the progress of the case and a duplication of those efforts in the federal court action would create an unnecessary hardship on the federal court's limited judicial resources. This Court held that the Whittemores' federal court action was the exact type of case that was contemplated by the *Colorado River* doctrine as being exceptional.

The instant case is no different. A simple comparison of the Whittemores' federal court complaint with Mamer's Second Amended Complaint filed in this action reveal their similarities. *Compare Exhibit 2 with Doc. # 5.*

Yet, four days after this Court granted the Seenos' Motion to Dismiss or, In the Alternative, Stay Proceedings in the Whittemores' federal court action, Mamer attempted to frustrate the inevitable imposition of a stay in a desperate attempt to preclude the same ruling in this case. On August 19, 2012, Mamer filed his Notice of Dismissal whereby Mamer voluntarily dismissed his counterclaims in the state court action. *See Exhibit 11.* Then, after being confronted with Defendants' Motion to Dismiss or, In the Alternative, Stay Proceedings (Doc. # 4) in this case, Mamer again attempted to preclude a ruling similar to that in the Whittemores' federal court action by filing his Second Amended Complaint removing WNG as a named defendant. *See Doc. # 5.* Mamer's dismissal and attempt to misalign the parties are obvious strategic efforts to forum shop and avoid litigating his claims in the state court action.

III. LAW AND ANALYSIS

A. MAMER'S SECOND AMENDED COMPLAINT AND THE ALLEGATIONS THEREIN ARE MANDATORY COUNTERCLAIMS IN THE STATE COURT ACTION.

As illustrated above, the facts, circumstances, events, and transactions addressed in the determination of whether the Whittemores engaged in forum shopping. *See Exhibit 10.*

1 state court action are the same as, similar to, or identical to the relevant facts, circumstances,
 2 events, and transactions addressed in Mamer's Second Amended Complaint filed in this case.
 3 The legal allegations overlap.

4 Mamer is obligated to file the claims that he has made in this case as compulsory
 5 counterclaims in the state court action just as he already acknowledged by filing his mandatory
 6 counterclaims in response to WNG's First Amended Complaint, only to voluntarily withdraw
 7 them. NRCP 13(a) is dispositive. It reads:

8 A pleading shall state as a counterclaim any claim which at
 9 the time of serving the pleading, the pleader has against any
 10 opposing party, if it arises out of the transaction or occurrence
 11 that is the subject matter of the opposing party's claim and
 does not require for its adjudication the presence of third
 parties of whom the court cannot acquire jurisdiction.

12 Nev. R. Civ. P. 13(a).

13 Rule 13(a) is to be liberally construed because it was designed to prevent multiplicity of
 14 actions and to achieve resolution in a single lawsuit of all disputes arising out of common
 15 matters. *S. Constr. Co. v. Pickard*, 371 U.S. 57, 60 (1962). Moreover, a subsequent action
 16 cannot be maintained when the claims asserted should have been brought as compulsory
 17 counterclaims in a previous action. *Springs v. First Nat'l Bank*, 835 F. 2d 1293, 1296 (9th Cir.
 18 1998). A counterclaim is compulsory if there is any "logical relationship" between the claim and
 19 the counterclaim. *Id.*; *MacDonald v. Krause*, 362 P.2d 724, 729 (Nev. 1961).

20 All of Mamer's claims are compulsory counterclaims in the state court action. Mamer's
 21 previously-filed counterclaims in the state court action were factually and legally identical to his
 22 claims alleged in this action. Compare **Exhibit 4** with Doc. # 5. Each and every one of Mamer's
 23 claims stem from his employment relationship with WNG.

24 Mamer's federal law claims under RICO, FMLA, and FLSA, are also mandatory
 25 counterclaims. Because state and federal courts have concurrent jurisdiction over RICO, FMLA,
 26 and FLSA claims, Mamer must raise his federal claims in the state court action: these claims
 27 arise out of the same transactions and occurrences as those at issue in the state court action, that
 28 is, Mamer's employment with WNG. See *Tafflin v. Levitt*, 493 U.S. 455, 467 (1993); *Lou v.*

1 *Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987).

2 The state court action already has jurisdiction over WNG as a named party in that action.
 3 And while Albert Seeno, Jr., and Thomas Seeno are not individually named parties in the state
 4 court action, they are the two managers of the plaintiff entities in that action and seek to recover
 5 damages on behalf of the company. Even Mamer's own allegations allege that all of the Seenos
 6 are parties to the state court action. *See* Doc. # 5 ¶ 105 ("The Seeno Defendants [defined as
 7 "Albert Seeno, Jr., Tom Seeno, [and] Albert Seeno, III," ¶ 8] sued Mamer in Nevada District
 8 Court alleging among other things civil conspiracy, breach of contract, breach of the implied
 9 covenant of good faith and fair dealing, and misappropriation of trade secrets."). Concerning
 10 Albert Seeno, III, Mamer's previously-filed counterclaim named him throughout although
 11 Mamer strategically failed to name Albert Seeno, III, as a defendant thereto. *See Exhibit 4 ¶¶ 5-*
 12 *14*. Moreover, the remaining Defendants are employees of WNG, or an affiliate entity of WNG.
 13 *See generally* Doc. # 5. While the Seenos and these Defendants were not named in the state
 14 court action, this fact is inconsequential. *See* Nev. R. Civ. P. 13(a).

15 NRCP 13(a) contemplates this specific situation. NRCP 13(a) clearly provides that any
 16 claim arising out of the same transaction and occurrence (at the time of the service of the
 17 pleading) must be asserted as a counterclaim so long as the claim "does not require for its
 18 adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule
 19 13(a) expressly recognizes the instance in which a compulsory counterclaim may concern third
 20 parties who are not, as of yet, under the court's jurisdiction. Rule 13 then offers a specific
 21 subsection to address that scenario. *See* Nev. R. Civ. P. 13(h); *Lund v. Dist. Ct.*, 255 P.3d 280,
 22 283 (Nev. Adv. Op. No. 28, June 2, 2011).

23 NRCP 13(h), entitled "Joinder of Additional Parties," reads, "Persons other than those
 24 made parties to the original action may be made parties to a counterclaim or cross-claim in
 25 accordance with the provisions of Rules 19 and 20." NRCP 19 and 20 set forth the procedures
 26 for mandatory and permissive joinder of parties, respectively. *See Dutchess Bus. Servs. v. State,*
 27 *Bd. of Pharm.*, 191 P.3d 1159, 1165 (Nev. 2008). NRCP 19 requires joinder of all parties
 28 necessary for an action's just adjudication. Nev. R. Civ. P. 19(a)(1)-(2). NRCP 20(a) authorizes

1 permissive joinder of a defendant against whom a right to relief is asserted “in respect of or
 2 arising out of the same transaction, occurrence, or series of transactions or occurrences and if any
 3 question of law or of fact common to all these persons will arise in the action.” The individual
 4 Defendants and WNG Management Company can be made parties to the state court action in
 5 accordance with Rules 19 and 20 and as prescribed by NRCP 13(h). *See Lund*, 255 P.3d at 283.
 6 Mamer’s claims are compulsory counterclaims and must be alleged in the state court action just
 7 as he previously attempted to do.

8 **B. THIS COURT HAS AUTHORITY TO DISMISS OR STAY.**

9 Despite the general principle that federal courts have an obligation to exercise the
 10 jurisdiction given them, exceptions exist. One such exception is the *Colorado River* doctrine.
 11 *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). No different
 12 than its applicability to the Whittemores’ federal court action, this doctrine is applicable to this
 13 case. A dismissal or a stay of these proceedings is proper. Mamer should be required to
 14 prosecute his claims as counterclaims in the state court action.

15 The court, in its discretion, may decline to exercise its jurisdiction based upon
 16 considerations of wise judicial administration, giving regard to conservation of judicial resources
 17 and comprehensive disposition of litigation under the *Colorado River* doctrine. *See id.*
 18 Likewise, a dismissal or stay under this doctrine may be appropriate when duplicative litigation
 19 in state courts creates a risk of tension in state and federal courts. *Will v. Calvert Fire Ins. Co.*,
 20 437 U.S. 655, 663 (1978).

21 A dismissal or stay should occur when exercising federal jurisdiction would result in
 22 uneconomical or vexatious litigation. *Brillhart v. Excess Ins. Co.*, 361 U.S. 491, 495 (1942).
 23 Although duplicative litigation is sometimes allowed, the *Colorado River* doctrine prevents
 24 piecemeal litigation and the concomitant danger of inconsistent rulings. *Stewart v. W. Heritage*
 25 *Ins. Co.*, 438 F.3d 488, 491 (5th Cir. 2006). The essence of this doctrine concerns the efficient
 26 use of judicial resources and the public’s perception of the legitimacy of judicial authority.

27 Six basic factors are involved in the *Colorado River* doctrine analysis. *E.g.*, *Stewart*, 438
 28 F.3d at 491; *Holder v. Holder*, 305 F.3d 854, 870 (9th Cir. 2002). First is the assumption by

1 either the state or federal courts of the res. *Id.* Second is the relative inconvenience of the fora.
 2 *Id.* Third is the consideration and desirability of avoiding piecemeal litigation *Id.* Fourth is the
 3 order in which the respective courts obtained jurisdiction. *Id.* Fifth is whether state law or
 4 federal law provides the rule for decisions on the merits. *Id.* Finally, the court should consider
 5 the adequacy of the state court proceeding in protecting the parties' rights. The Ninth Circuit has
 6 also considered whether the federal action was the result of forum shopping. *E.g., Nakash v.*
 7 *Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989); 17A Charles Alan Wright & Arthur R. Miller,
 8 *Federal Practice and Procedure: Juris.* § 4247 (3d ed. 2011 Update). Discussed below, these
 9 factors heavily favor a dismissal or a stay of this action. Exceptional circumstances exist to
 10 warrant abstention.

11 **1. Jurisdiction Over the Res is Inapplicable.**

12 It cannot be reasonably disputed that the first factor, jurisdiction over the res, is
 13 inapplicable in this case. Both cases concern contract and tort claims from which money
 14 damages are sought. "[M]oney . . . is not the sort of tangible physical property referred to in
 15 Colorado River." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1368 (9th Cir. 1990)
 16 (quotations and citation omitted).

17 **2. Clark County is the More Convenient Forum.**

18 The second factor, convenience of the forums, supports the issuance of a stay. The state
 19 court action is the more convenient forum. Mamer, himself, is a resident of Clark County. Doc.
 20 # 5 ¶ 4. The named individual defendants worked in Nevada during the pertinent time period
 21 alleged in Mamer's Second Amended Complaint. *See generally* Doc. # 5. Mamer's action
 22 involves and names as Nevada companies as defendants. *See id.* The contracts entered into and
 23 which are, in part, the subjects of Mamer's action were entered into in the State of Nevada. *See*
 24 *generally id.* Further, the actions complained of by Mamer in this case all occurred in Clark
 25 County, during his employment in Clark County. *See generally id.* A stay is warranted. Mamer
 26 should be required to prosecute the claims in the Clark County, state court action.

27 ///

28 ///

1 **3. Piecemeal Litigation Will Certainly Result Absent a Stay.**

2 The third factor, the consideration and desirability of avoiding piecemeal litigation,
 3 highly favors a stay. In the case *Nakash v. Marciano*, 882 F.2d 1411, 1416-17 (9th Cir. 1989),
 4 the Ninth Circuit held that despite that each action alleged wrongdoing on the other party's part,
 5 the proceedings were in fact parallel. Even more persuasive than the facts in *Nakash*, Mamer has
 6 focused on the purported wrongdoing of WNG and the Seenos in both this case and in his
 7 previously-filed counterclaim in the state court action. Both actions concern Defendants'
 8 purported threatening and unlawful activity against Mamer during his employment with WNG.
 9 Compare **Exhibit 3** with Doc. # 5. These proceedings are factually aligned, if not identical, and
 10 the issues overlap.

11 The facts that Mamer decided to strategically name employees of WNG and a WNG
 12 affiliated entity, remove WNG as a defendant from this case, and withdraw his state court
 13 counterclaims are inconsequential. The proceedings are still parallel. See *Nakash*, 882 F.2d at
 14 1416-17. WNG's claims against Mamer in the state court action arise out of and concern
 15 Mamer's employment with WNG and his improper conspiracies with the Whittemores. Mamer's
 16 instant lawsuit stems from and concerns his employment with WNG and concerns Whittemore.
 17 Mamer's claims are mandatory counterclaims to the state court action. Mamer's obvious
 18 attempts to manipulate the procedural rules to avoid litigating his claims in the state court action
 19 should not be condoned.

20 **4. The State Court Action Obtained Jurisdiction First and has**
 21 **Substantially Progressed.**

22 The fourth factor, the order in which the respective courts obtained jurisdiction is also
 23 significant and favors a stay. The order in which jurisdiction of the two actions was obtained is
 24 not "measured exclusively by which complaint was filed first, but rather in terms of how much
 25 progress has been made in the two actions.'" *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364,
 26 1370 (9th Cir. 1990) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S.
 27 1, 21 (1983)). The Seenos filed WNG's First Amended Complaint in the state court action on
 28 February 9, 2012. See **Exhibit 3**. Mamer filed his Counterclaim in that action on May 11, 2012.

1 See **Exhibit 4**. Mamer only recently filed his Second Amended Complaint on September 9,
2 2012. See Doc. # 5. Thus, the state court action, in all respects, was filed first.

3 Not only was the state court action the first filed action, but it has also progressed
4 substantially farther than this action. More precisely, the state court action has already
5 progressed past the Rule 12(b)-motion stage and the pleadings are closed. Additionally, the state
6 court has heard and ruled on important motions concerning arbitration, discovery disputes, and
7 disputes concerning the return of personal property and appointment of an independent
8 accountant. The parties have entered into a Stipulated Protective Order, which has been accepted
9 and approved by the state court.

10 Substantial discovery has also occurred in the state court action. The initial case
11 conference has occurred. The state court has issued its scheduling order. Initial witness
12 disclosures, initial document disclosures, privilege logs, and first through seventh supplements
13 thereto have been exchanged by the parties, amounting the production of hundreds of thousands
14 of pages of documents. Similarly, requests for production of documents and responses have been
15 served.

16 At least nine depositions have already been noticed and confirmed. These depositions
17 pertain to the following individuals: (1) Mamer; (2) Thomas Seeno; (3) Albert Seeno, Jr.; (4)
18 Albert Seeno, III; (5) Larry Gunderson; (6) Kevin McCauley; (7) James England; (8) James
19 Harris; and (9) Aaron Hardinger. Importantly, all of these persons are central to the allegations
20 set forth in Mamer's Second Amended Complaint in this action. See *generally* Doc. # 5.
21 Subpoenas Duces Tecum have been noticed for the following institutions, most of which have
22 agreed to produce the requested documents without appearing: (1) Morgan Stanley & Co, LLC;
23 (2) City National Bank; (3) Bank of the West; (4) Bank of America; (5) Nevada State Bank; (6)
24 Merrill Lynch; (7) American Express; (8) Sunshine Reporting and Litigation Services, LLC; and
25 (9) Whittemore Peterson Institute for Neuro-Immune Disease.

26 Finally, a trial date for the state court action has been set for May 20, 2013, and a
27 settlement conference is scheduled to occur on December 20 and 21, 2012.

28 In summary, not only did the state court first obtain jurisdiction over the claims and

1 previously-filed counterclaims implicated in this case, but the state court action has progressed
 2 substantially to date. Most significant about the status of the state court action is that all of the
 3 progress made by the parties in that action will have to be duplicated here absent dismissal or a
 4 stay. This factor favors a stay.

5 **5. Mamer's Federal Law Claims are Permitted in State Court.**

6 The fifth factor, whether state or federal law applies, favors a stay as well. Mentioned
 7 above and specifically addressed *infra* at § IIIC of this motion, the state court has concurrent
 8 jurisdiction over Mamer's federal claims alleged under the RICO, FMLA, and FLSA statutes.
 9 Naturally, state law applies to Mamer's contract and tort claims. This factor favors a stay.

10 **6. The State Court Proceedings are Adequate.**

11 The sixth factor, the adequacy of the state court proceeding in protecting the parties'
 12 rights, also favors a stay. Again, the state court has jurisdiction over Mamer's federal and state
 13 claims. Moreover, the Nevada Rules of Civil Procedure permit and facilitate comprehensive
 14 dispute resolution, as provided for in NRCP 13(h) and as elaborated upon in *Lund v. Dist. Ct.*,
 15 255 P.3d 280, 283 (Nev. Adv. Op. No. 28, June 2, 2011). Mamer can, and must, allege these
 16 claims as counterclaims in the state court action, even against the currently unnamed individuals
 17 and entity. Mamer's rights are adequately protected in the state court action. A stay is warranted
 18 and Mamer should be compelled to litigate these claims in the state court action.

19 **7. Mamer's Forum Shopping Activities Favor a Stay.**

20 The final factor for consideration, whether the plaintiff is forum shopping, "weighs
 21 strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989)
 22 (emphasis added). A district court's application of the *Colorado River* doctrine has been
 23 affirmed on the ground that a federal plaintiff has engaged in forum shopping. *E.g., id; R.R.*
 24 *Street & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 981 (9th Cir. 2011).

25 The Ninth Circuit recently defined the meaning of "forum shopping" for purposes of the
 26 *Colorado River* analysis. *See R.R. Street & Co.*, 656 F.3d at 981. The Ninth Circuit explained
 27 that "forum shopping" refers to "[t]he practice of choosing the most favorable jurisdiction or
 28 court in which a claim might be heard." *Id.* The *R.R. Street & Co.* court continued on to explain

1 that, in order to avoid forum shopping, “the vexatious or reactive nature of either the federal or
 2 state litigation may influence the decision whether to defer to parallel state litigation.” *Id.*
 3 (citation omitted) (emphasis added).

4 Mamer should be bound to his initial choice of litigating these claims as mandatory
 5 counterclaims in the state court action. *See Am. Int’l Underwriters, Inc. v. Cont’l Ins. Co.*, 843
 6 F.2d 1253, 1259 (9th Cir. 1988) (“Having elected state court, plaintiff should be bound by its
 7 choice absent compelling reasons to seek relief in another forum.”) (internal citations omitted).
 8 The facts and legal issues alleged in both cases are similar if not identical and pertain to the same
 9 events, agreements, companies, and individuals, or their employees.

10 Further, Mamer only now complains of actions that occurred as far back as 2009 and only
 11 as recent as over a year ago. Likewise, in this tardy fashion, Mamer’s Second Amended
 12 Complaint comes five months after the filing of his counterclaims in the state court action and
 13 after the state court action has substantially progressed. This action was also filed only after the
 14 Whittemores filed their federal court action concerning the same and similar allegations. The
 15 vexatious and “reactive nature” of this suit evidences Mamer’s attempts to forum shop.

16 Further, Mamer’s reactive procedural machinations cannot be more obvious of his
 17 attempts to forum shop. When this Court stayed the Whittemores’ federal court action based
 18 upon its duplicative nature and the Whittemores’ pending counterclaims against WNG, Mamer
 19 voluntarily dismissed his identical state court counterclaims only to avoid a similar ruling in this
 20 case. *See Exhibit 11*. Then, when Defendants filed their Motion to Dismiss or, In the
 21 Alternative Stay Proceedings (Doc. # 4), Mamer again engaged in forum shopping efforts when
 22 he filed his Second Amended Complaint to remove WNG as a named defendant and attempt to
 23 misalign the parties. Mamer’s removal of WNG as a defendant was solely an attempt by Mamer
 24 to once again avoid the instant motion and a decision by this Court staying or dismissing this
 25 action.

26 Mamer’s strategic, voluntary dismissal of his state court counterclaims after this Court’s
 27 ruling in the Whittemores’ similar federal court action and tardy removal of WNG from this case
 28 after reviewing Defendants’ initial motion illustrates Mamer’s improper motives. “This factor

weighs strongly in favor of abstention.” *See Nakash*, 882 F.2d at 1417 (emphasis added).

8. **The Satisfaction of These Factors Evidence the Presence of Exceptional Circumstances Warranting Dismissal or a Stay.**

The state court action is far more comprehensive and is all inclusive of the claims and supporting factual and legal issues alleged by Mamer in this action. Due to the substantial similarities of the parties and issues, piecemeal litigation is certain. Mamer’s claims in this case are mandatory counterclaims to the state court action, all over which the state court has jurisdiction and can afford the parties sufficient protection. Mamer’s federal complaint, based on his employment with WNG, concerns the same matters at issue in the state court action, “and there is no reason to believe [that Mamer] cannot raise th[ese] theories in the pending original action. Merely raising an alternative theory of recovery, which may still be raised in state court, is not enough to differentiate the federal suit from the state suit.” *See Telesco v. Telesco Fuel & Masons’ Materials*, 765 F.2d 356, 363 (2d Cir. 1985) (cited by *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989)). Mamer’s forum-shopping activities particularly weigh in favor of a dismissal or stay. *See Nakash*, 882 F.2d at 1417 (holding that a plaintiff’s forum shopping “weighs strongly in favor of abstention”).

Exceptional circumstances exist. Giving regard to the conservation of judicial resources and comprehensive disposition of litigation, and in wise judicial administration, a stay or dismissal under the *Colorado River* doctrine is warranted.

C. **THE STATE COURT HAS JURISDICTION OVER ALL OF MAMER’S CLAIMS.**

In an effort to follow in the retaliatory footsteps of the Whittemores, defendants in the state court action and plaintiffs in their stayed federal court action, *Whittemore et al. v. Seeno et al.*, Case No. 3:12-cv-00063-LRH-WCG, Mamer is attempting to forum shop. Mamer’s efforts are clear. His counterclaims previously filed in the state court action reveal that Mamer has simply realleged his state court counterclaims here in addition to his federal question claims. Mamer only elected to dismiss his counterclaims to avoid the instant motion and a ruling similar to that rendered in the Whittemores’ federal court action on this same issue. However, not only does the state court have jurisdiction over Mamer’s contract and tort claims, but Mamer’s federal

question claims are also within the jurisdiction of the state court. Mamer should not be permitted to forum shop and avoid his obligation to litigate these facts and legal claims in a counterclaim in the state court action.

1. The State Court has Jurisdiction Over Mamer's RICO Claims.

It is well settled that state and federal courts share concurrent jurisdiction over RICO claims brought pursuant to 18 U.S.C. §§ 1961, 1962, and 1964, *et seq.* *E.g., Tafflin v. Levitt*, 493 U.S. 455, 467 (1993); *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987). The United States Supreme Court has expressed full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, conspiracy claims, and claims of threats, over which state courts presumably have greater experience. *See Tafflin*, 493 U.S. at 465-66. The state court has jurisdiction over Mamer's RICO claims.

2. The State Court has Jurisdiction Over Mamer's Claim for Declaratory Relief.

Pursuant to NRS 30.030, "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." Thus, the state court has jurisdiction over Mamer's request for declaratory relief.

3. The State Court has Jurisdiction Over Mamer's FMLA Claim.

As prescribed in the statute itself, state courts have concurrent jurisdiction over claims alleged under the Family Medical Leave Act. *See* 29 U.S.C. § 2617(a)(2) ("An action to recover the damages or equitable relief prescribed in . . . [this statute] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction.") (emphasis added). Therefore, the state court has jurisdiction over Mamer's FMLA claim.

4. The State Court has Jurisdiction Over Mamer's FLSA Claim.

Like Mamer's RICO and FMLA claims, Mamer's claim under the Fair Labor Standards Act may also be properly adjudicated in the state court action. The FLSA expressly provides that an action "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. §216(b) (emphasis added); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694

(2003). Consequently, the state court has jurisdiction over Mamer's FLSA claim.

5. The State Court has Jurisdiction Over Mamer's Contract and Tort Claims.

Mamer suggests in his Second Amended Complaint that this Court has jurisdiction over its contract and tort claims. *See* Doc. # 5 at 1-2. He suggests that this Court has pendent jurisdiction over state law claims. *Id.* While true, the state court also has jurisdiction over the state law claims. Indeed, the state court claims made by Mamer in this federal court action arise out of the transactions and occurrences that are the subject matter of the state-court plaintiffs' claims. According to Rule 13 of the Nevada Rules of Civil Procedure, Mamer "shall state as a counterclaim" any claim that, at the time of serving the state court complaint, Mamer had against the Seenos, WNG, WNG employees, and WNG Management Company. *See supra* § IIIA. The state court has jurisdiction over Mamer's contract and tort claims.

D. THE VENUE OF THE STATE COURT ACTION IS THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA.

Venue is proper in Clark County because Mamer is a defendant in the state court action and is a resident of Clark County, Nevada. *See* Doc. # 5 ¶ 4. NRS 13.040 requires that an action must be commenced and tried in the county in which the defendants, "or any one of them," resides. Also, NRS 13.010(1) requires that a state court action be filed where a contractual obligation is to be performed or in which the person resides. Many of the obligations alleged in the state court action include those arising out of Mamer's employment with WNG, which occurred and were contracted for in Clark County. *See generally* Doc. # 5.

IV. CONCLUSION

For the reasons stated, Defendants seek an order from this Court dismissing Mamer's Second Amended Complaint (Doc. # 5) or, in the alternative, staying this action and requiring

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1 Mamer to litigate his claims in the all-inclusive state court action filed in Clark County.

2 DATED this 29th day of October, 2012.

3 ROBISON, BELAUSTEGUI, SHARP & LOW
4 A Professional Corporation
5 71 Washington Street
6 Reno, Nevada 89503

7 By:



8 KENT R. ROBISON
9 KRISTEN L. MARTINI
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11 IN ASSOCIATION WITH:
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15 3883 Howard Hughes Parkway, Suite 800
16 Las Vegas, Nevada 89169

CERTIFICATE OF SERVICE

Pursuant to FRCP 5, I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a true copy of the **MOTION TO DISMISS SECOND AMENDED COMPLAINT (DOC. #5) OR, IN THE ALTERNATIVE, STAY PROCEEDINGS** on all parties to this action by the method(s) indicated below:

_____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

X_____ by using the Court's CM/ECF Electronic Notification System addressed to:

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200 South Virginia Street, 8th Floor
P.O. Box 18811
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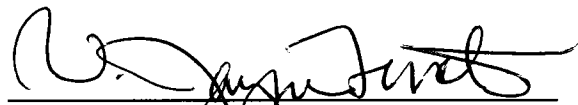
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Attorneys for Defendants

_____ by personal delivery/hand delivery addressed to:

_____ by facsimile (fax) addressed to:

_____ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 29th day of October, 2012.



V. JAYNE FERRETTO